

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

---

PHILIPS NORTH AMERICA LLC,

Plaintiff,

v.

FITBIT LLC,

Defendant.

---

Civil Action No. 1:19-cv-11586-FDS

**PHILIPS NORTH AMERICA LLC'S RESPONSE TO FITBIT LLC'S  
MOTION FOR LEAVE TO SUBMIT SUPPLEMENTAL AUTHORITY FOR  
ITS MOTION TO STRIKE PORTIONS OF THE EXPERT REPORT AND  
EXCLUDE CERTAIN OPINIONS AND TESTIMONY OF DR. AKEMANN  
(DKT. 383)**

Plaintiff Philips North America LLC (“Philips”) respectfully submits this Opposition to Fitbit’s Motion for Leave to File Supplemental Authority, (Dkt. 383), regarding the Federal Circuit decision in *Niazi Licensing Corp. v. St. Jude Med. S.C., Inc.*, 30 F.4th 1339 (Fed. Cir. 2022).

*Niazi* is not relevant to Fitbit’s pending motion to preclude certain opinions and testimony of Dr. Akemann. The Federal Circuit’s decision in *Niazi* concerns a complete failure to base damages on allegedly infringing products, an issue Fitbit did not raise in its pending motion challenging Dr. Akemann—instead Fitbit only challenged the comparability of the licenses used by Dr. Akemann while alleging (incorrectly) that Dr. Akemann applied the Entire Market Value Rule (“EMVR”), issues not addressed by *Niazi*. (See Dkt. 310 at 11-16.) Regardless, Dr. Akemann’s analysis apportioned by using the well-recognized comparable license approach to determine the proper assessment of damages via a per unit royalty rate, and included in his royalty base only products that infringe. (See Dkt. 320 at 2-16.) The Federal Circuit has recognized that apportionment is “built in” under the comparable license approach. *Cmmw. Sci. and Indus.*

*Research Organisation v. Cisco Sys., Inc.*, 809 F.3d 1295, 1303 (Fed. Cir. 2015). In contrast, the expert in *Niazi* used sales of any number of components (e.g. catheters, guide wires, and leads)—that undisputedly did not infringe and therefore should not have been accrued damages, *Niazi*, 30 F.4th 1357.

Nor does *Niazi* introduce any new legal authority that Fitbit could not have raised earlier. Rather, *Niazi* is nothing more than a straightforward application of *Cardiac Pacemakers, Inc. v. St. Jude Med., Inc.*, 576 F.3d 1348, 1358–59 (Fed. Cir. 2009), and the uncontroversial principle that damages should only be recovered for infringement.

The Court should deny Fitbit’s Motion for Leave to File Supplemental Authority as *Niazi* in neither helpful nor relevant to the issues in dispute.

Dated: May 11, 2022

Respectfully Submitted,

/s/ Ruben J. Rodrigues

Lucas I. Silva (BBO 673,935)  
Ruben J. Rodrigues (BBO 676,573)  
John W. Custer (BBO 705,258)  
FOLEY & LARDNER LLP  
111 Huntington Avenue  
Suite 2500  
Boston, MA 02199-7610  
Phone: (617) 342-4000  
Fax: (617) 342-4001  
lsilva@foley.com  
rrodrigues@foley.com  
jcuster@foley.com

Eley O. Thompson (*pro hac vice*)  
FOLEY & LARDNER LLP  
321 N. Clark Street  
Suite 2800  
Chicago, IL 60654-5313  
Phone: (312) 832-4359  
Fax: (312) 832-4700  
ethompson@foley.com

Michelle A. Moran  
FOLEY & LARDNER LLP  
777 East Wisconsin Avenue  
Milwaukee, WI 53202  
Phone: (414) 271-2400  
Fax: (414)297-4900  
mmoran@foley.com

*Counsel for Plaintiff  
Philips North America LLC*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing document was filed with the Court through the ECF system and that a copy will be electronically served on registered participants as identified on the Notice of Electronic Filing.

Dated: May 11, 2022

/s/ Ruben J. Rodrigues

Ruben J. Rodrigues